SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-305

ANGELO F. CONIGLIO, *Petitioner*

v.

HIGHWOOD SERVICES, INC., *et al.*, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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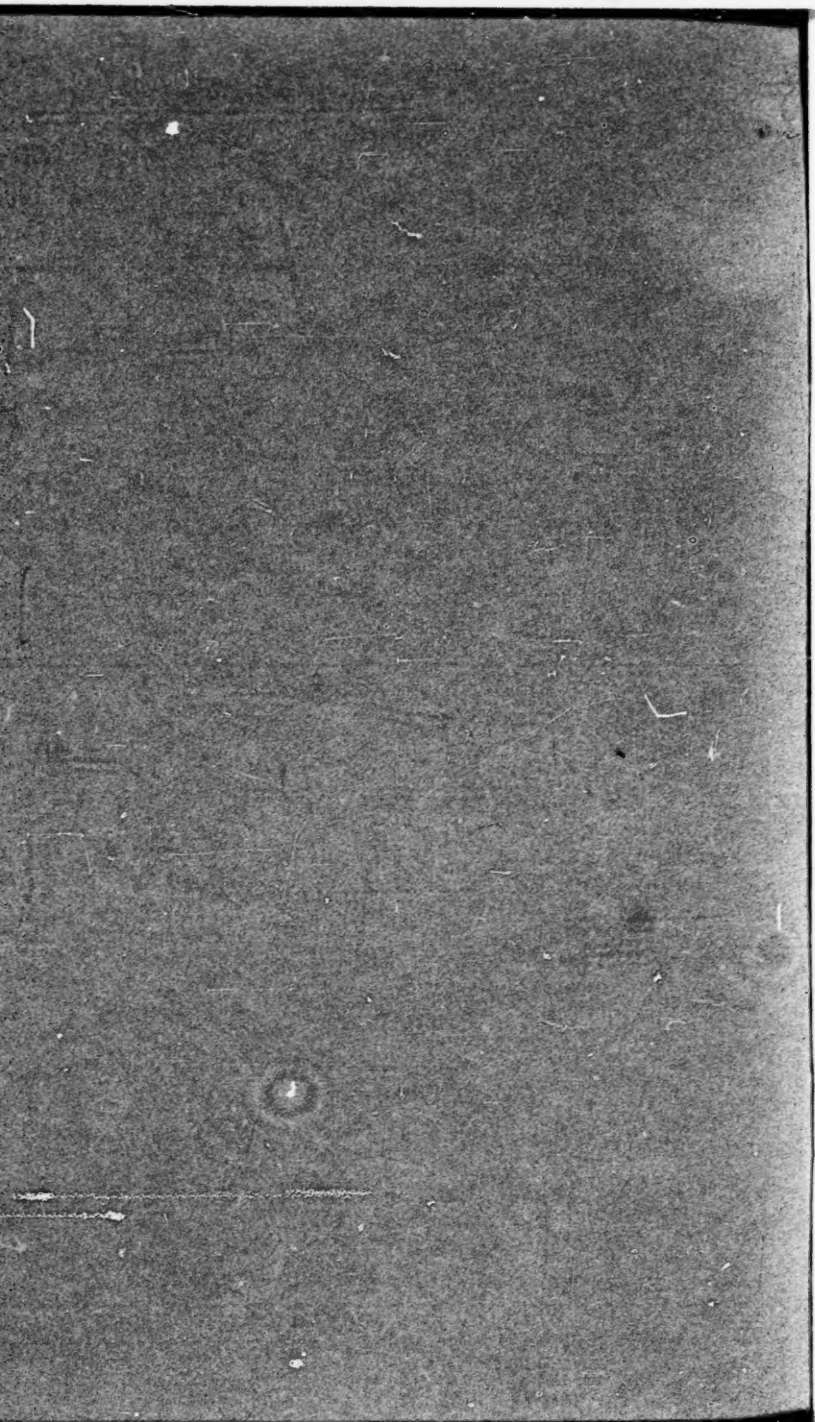

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Angelo F. Coniglio petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 17, 1974.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-14a) is reported at 495 F.2d 1286. The opinion of the United States District Court for the Western District of New York (App. 19a) appears at 1973 CCH Trade Cas. ¶74,795 but is not officially reported.

JURISDICTION

The judgment of the court of appeals (App. 15a) was entered on April 17, 1974. A timely petition for rehearing with a suggestion of rehearing *en banc* was denied on June 21, 1974 (App. 16a). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act (15 U.S.C. §1) provides in part:

> "Every contract . . . in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ."

QUESTIONS PRESENTED

I. Is a tying arrangement that directly restrains the consumer's freedom not to purchase an unwanted product made lawful by the circumstance that the seller has a monopoly over the tied product?

II. Even if injury to competitors as well as consumers is necessary to make a tying arrangement unlawful, may the opportunity to prove such injury be foreclosed on the basis of an appellate court's preconceptions as to the "relevant market" for the tied product?

STATEMENT

The Buffalo Bills (a member of the National Football League owned by defendant Highwood Services, Inc.) is the only professional football team in the Buffalo, New York area. Petitioner Coniglio and the roughly 23,000 class members on whose behalf he sues were, at the pertinent times, holders of season tickets for the Bills' home games. This suit challenges, as an illegal tying arrangement, the requirement that all persons desiring season tickets for the Bills' seven regular-season home games also purchase tickets for less desirable pre-season exhibition games. The results, in the typical season of 1970, was that in order to obtain the best tickets for the regular season, class members were required to pay not only $49 for one seat at those seven games but an additional $21 for three pre-season games. Prior to 1966, the Bills had imposed no such burden upon season ticket holders; many fewer pre-season tickets had then been sold on a voluntary game-by-game basis than subsequently under the post-1966 compulsion.[1]

Having certified the plaintiff class (60 F.R.D. 359 (1972)), the district court granted defendants' motion for summary judgment on the ground that there was no tying arrangement (App. 20a). The court of appeals rejected the district court's reasoning but affirmed on a different ground—holding that there was indeed a tying arrangement between regular and exhibition games, but that it lacked one of the essential elements of illegality. The missing element, in the court's view, was "an anti-competitive effect in the tied (exhibition football game) market" (App. 9a), which the court found absent be-

1. See pp. 25a, 44a of the appendix in the court of appeals, which is being transmitted to this Court.

cause of the Bills' monopoly over exhibition games as well as regular-season games in the Buffalo relevant market.[2]

The court of appeals based its analysis upon its distillation from *Northern Pacific Ry. Co. v. United States* 356 U.S. 1, of "four factors essential to determining whether a particular sales practice constitutes an illicit tying arrangement." These, the court held, were the following:

> "(1) two separate and distinct products, a tying product and a tied product;
>
> "(2) sufficient economic power in the tying market to coerce purchase of the tied product;
>
> "(3) anti-competitive effects in the tied market;
>
> "(4) involvement of a 'not insubstantial' amount of interstate commerce in the tied market." [App. 6a.]

The court of appeals found no problem with the last of these factors in view of the fact that "in 1970 alone, the total value of tied exhibition game tickets was approximately $483,000" (App. 6a). As to the first two factors, the court found substantial issues that could be determined only at trial. "[T]he distinction between exhibition and

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2. The case was originally brought against a defendant class consisting of all National Football League clubs with similar ticket arrangements and on behalf of a plaintiff class consisting of all season ticket holders of such clubs. The district court limited the plaintiff class to Bills season ticket holders and eliminated the defendant class.

The court of appeals did not reach the allegations that defendants National Football League and Pete Rozelle (its Commissioner) conspired with Highwood, holding that any illegal conspiracy would exist only if the underlying ticket sale arrangement were unlawful. Since petitioner does not challenge that holding here, there is no separate issue with respect to the League and Rozelle; the only issue presented is the legality of the tying arrangement.

regular season contests is sufficiently sharp, at the very least, to render the factual determination of product separability more appropriate for a trial rather than for summary judgment" (App. 9a; see also 8a). With respect to the power of coercion, the court found that "the buyer is not 'free to take either product [season ticket or exhibition game ticket] by itself' " (App. 7a; bracketed material in original text) and that season tickets have "advantages" over individually purchased tickets for regular games that are "sufficient at least to persuade us that the existence of the requisite economic power is a triable issue of fact" (App. 7a-8a).[3]

Notwithstanding its conclusion that three of its criteria of illegality were satisfied, the court of appeals held that summary judgment was required for a reason not considered by the district court—because plaintiff failed to show the "anti-competitive effects in the tied market" posted as the third of the court's four factors. In so holding, the court articulated two principles of law: (1) that a Section 1 "restraint of trade or commerce" is not made out by showing that "the tying arrangement merely interfere with the consumer's freedom of choice in deciding whether to purchase the tied product" unless such interference also has an adverse effect upon competition among businessmen (App. 12a); and (2) that the competition so restrained must be in a "relevant market" defined as in a case under Section 2 of the Sherman Act or Section 7 of the Clayton Act (App. 11a-12a). The court went on to hold plaintiff's assertion of anti-competitive effects upon alternative entertainment activities on exhibition game nights insufficient as a matter of law because of a lack of the specificity

3. The court relied upon the fact that 23,000 of 46,000 seats were sold to season holders notwithstanding the tie-in (App. 8a) and upon season holders' "advantages over those who purchased tickets on an individual game basis, such as preferential seat selection, preferential call on post-season playoff tickets, and preferential seat selection for the following season" (App. 3a).

required by F.R. Civ. P. 56(e) and because "the extraordinary breadth of the market encompassing such diverse yet assertedly competitive products is far beyond that ever contemplated for a relevant product market" *(ibid.)*. The court thus limited the "relevant market" to professional football exhibition games and concluded that the Bills' monopoly over such games precluded any anti-competitive effects in a market so defined.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Failed to Recognize that the Sherman Act Protects "Trade or Commerce" Between Buyers and Sellers and Not Only that Between Competitors.

The premise of the adverse decision below was that a tying arrangement is not a violation unless its effect is upon *competition* with respect to the tied product. Thus, the court permitted what would otherwise be an unlawful scheme only because of the circumstance that the Buffalo Bills have a monopoly in what the court viewed as the "tied market" (professional football exhibition games). In Part II, petitioner shows the court's error in precluding plaintiff from showing actual restraint of competition in a broader market. Here, petitioner deals with the error in the premise—which has even greater importance in the interpretation of the Sherman Act—that Section 1's prohibition on "restraint of trade or commerce" encompasses only restraints of competition and excludes other restraints upon a free marketplace, such as direct consumer coercion to purchase an unwanted product.

It is beyond dispute that consumers are protected by the antitrust laws and may sue for excessive charges extracted from them by antitrust violations. *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396; see *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262-263. It is equally established, petitioner submits, that not only restraints upon competitors but all "restraints upon the freedom of economic units to act according to their own choice and discretion . . . run counter to antitrust policy." *United Mine Workers v. Pennington*, 381 U.S. 657, 668. Thus, *American Medical Assn. v. United States*, 317 U.S. 519, 529, held it immaterial to the existence of a criminal violation "[w]hether the conspiracy was aimed at restraining or destroying competition, or had as its purpose a

restraint of the free availability of medical or hospital services in the market...."[4] Petitioner knows of no authority or reason for the proposition that injury to *competition* (as a subcategory of restraint of trade or commerce) is any more essential to a Section 1 tying claim than to other claims under Section 1.

This Court has specifically identified impairment of customer choice—such as has occurred here—as a principal evil of tying arrangements. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 6, explained that tying agreements are condemned both because "[t]hey deny competitors free access to the market for the tied product," and "[a]t the same time [because] buyers are forced to forego their free choice between competing products." Consumer choice was even more strongly emphasized in *Associated*

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4. The same general principle underlies the rule articulated in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 377-378, which makes unlawful any agreement between a manufacturer and a distributor that imposes "any limitation upon the freedom of distributors to dispose of... products, which they have bought... where and to whomever they choose." It was also the basis for *Radovich v. National Football League*, 352 U.S. 445, 453, which allowed a professional football player's challenge to the reserve clause that precluded his employment to be " 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade.' " See also *Anderson v. Shipowners' Assn.*, 272 U.S. 359, 365. Compare also the early applications of the Sherman Act to labor union activities, recounted in *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 801-806, as well as *Council of Defense v. International Magazine Co.*, 267 Fed. 390, 411-412 (8 Cir. 1920), holding a consumer boycott unlawful.

Indeed, it is this categorical prohibition of all unreasonable restraints of "trade or commerce" that ultimately justifies all *per se* rules, which not only require no specific proof of anti-competitive effects but even preclude proof that a particular arrangement is pro-competitive. *United States v. Topco Associates, Inc.*, 405 U.S. 596. See generally *United States v. General Motors Corp.*, 384 U.S. 127, 145-147; *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211-212.

Press v. Taft-Ingalls Corp., 340 F.2d 753, 762 (6 Cir. 1965), *cert. denied*, 382 U.S. 820:

> "... AP required appellant to continue to subscribe and pay for three wires which appellant did not want and need, in order to receive a fourth wire which it considered to be essential, and thereby forced appellant to give up its independent judgment as to whether to subscribe to the three unwanted and unneeded services. This is one of the situations which is 'an object of antitrust concern.' *United States v. Loew's Inc.*,... 371 U.S. 38, 44-45...."

To be sure, tying arrangements commonly restrain both "trade or commerce" between competitors and "trade or commerce" between buyers and sellers. It is for that reason that the cases speak of competitors as well as buyers. But to say that such *double restraint* is prerequisite to a violation is a confusion of the familiar with the necessary, an example of "the danger in our system of law which has grown up from concrete cases rather than from abstract reasoning, of using precedents as principles *per se* and not as illustrations of principle." Chafee, *Progress of the Law—Equitable Relief Against Torts*, 34 Harv. L. Rev. 388, 391 (1921). Surely the opinion below inverted the basic principle when it asserted that the consumer's interest is of only indirect significance as "no more than the causal determinant of the proscribed restraint on competition" (App. 12a). The Sherman Act protects competition not as an abstract end in itself but because of its benefit to the public, as *Northern Pacific* itself expressly asserts, 356 U.S. at 4.

The decision below depends upon the paradoxical proposition that a natural monopoly creates an exemption from the proscriptions of Section 1. If this were so, a monopolist could force unwanted merchandise upon a dealer, in direct contradiction of the Third Circuit's holding in *Bra-*

gen v. Hudson County News Co., 321 F.2d 864 (3 Cir. 1963). In that case, a sufficient showing of unlawful tying was found in the absence of any suggestion of injury to competition involving either the dealer or the supplier. Similarly, a monopolist would be permitted to fix the prices at which exclusive dealers in different territories could sell his product, since they would not compete with each other. Moreover, in a shortage economy, it is not fanciful to conceive of other tying arrangements that would also be legitimized by the injury-to-competition requirement imposed below—such as the tying of a needed product to another product as to which there is no competition for the purchaser's trade because the tied product is utterly worthless to him.

The writ must be granted to correct the court of appeals' denigration of a fundamental antitrust principle—the right of the consumer to trade, or not to trade, in a marketplace that is free not only of restraints upon sellers but also of even more invidious direct restraints upon the consumer himself.[5]

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5. The inconsistent and undesirable effect of the Second Circuit's holding is highlighted by a decision in *Flood v. San Francisco Forty-Niners*, N.D. Cal., Civ. No. C 72 1704 (Memorandum of Decision, July 9, 1974), a case with facts similar to the matter *sub judice*. The only difference in *Flood* is that there existed nearby another professional football team. Hence, the District Court in *Flood* found the tie-in to have an "anti-competive effect" and denied defendant's motion for summary judgment.

Accordingly, there exists a situation in which two sellers have identical tying and tied products and identical tying arrangements. In one case, the seller has violated Section 1 of the Sherman Act because of the fortuitous circumstance that another professional football team plays nearby. In the other case, the seller has not violated Section 1 of the Sherman Act because of the fortuitous circumstance that *no other* professional football team plays nearby. Yet in both instances, the impact of the tying arrangement on the consumer is exactly the same.

II. Even if the Illegality of a Tying Arrangement Did Depend Upon Injury to Competition, the Court of Appeals Arbitrarily Precluded Petitioner's Proof of Anti-competitive Effects Outside a Preconceived "Relevant Market"

Petitioner's case does not depend upon the principle that effect upon competition with the tied product is unnecessary, for he has also proffered proof that the coerced purchase of pre-season tickets precluded the plaintiff class members from spending money on alternative entertainment activities (see App. 10a). The court of appeals dismissed such injury to competition out of hand, on the grounds that other forms of entertainment are outside the "relevant product market" and that petitioner had not made a sufficient factual showing to satisfy Rule 56(e) (App. 11a). These novel propositions would require this Court's correction even if the injury-to-competition premise were valid.

A. We are aware of no authority in this Court suggesting that concepts of "relevant market" evolved for purposes of defining "any part of the trade or commerce among the several States" under Sherman Act §2 and "any line of commerce in any section of the country" under Clayton Act §7 are to be read into Section 1 of the Sherman Act, especially in an area of *per se* violation. To the contrary, *United States v. Loew's, Inc.*, 371 U.S. 38, 45, n. 4, rejected an attempt to engraft a "full-scale factual inquiry into the scope of the relevant market" upon the determination of economic power in the tying product. And *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 501, held such a complex inquiry equally inappropriate to assessment of the restraint with respect to the tied product:

> "The requirement that a 'not insubstantial' amount of commerce be involved makes no reference to the scope of any particular market...."

Loew's observed that "the distinctiveness of the copyrighted tied product is not inconsistent with the fact of competition, in the form of other [television] programming material and other films, which is suppressed by the tying arrangements" (371 U.S. at 49). For the most that is needed is an "appreciable restraint on free competition" (*Northern Pacific, supra*, 356 U.S. at 11), not a monopoly or even a tendency to monopoly. The court of appeals thus erred egregiously in lifting the "relevant market" concept from its proper context and using it as a basis for foreclosing proof of actual anti-competitive effect.

B. The court of appeals did not state what kind of additional facts relating to competitive effect should have been provided in order to avoid summary judgment. Surely, petitioner was not required to present expert economic testimony in affidavit form even if a relevant market inquiry were appropriate; this Court has noted, for example, that "in cases involving the question whether a particular merger will tend 'substantially to lessen competition' . . . a trial rather than the use of the summary judgment is normally necessary." *White Motor Co. v. United States*, 372 U.S. 253, 264. Even on the court of appeals' view of the applicable legal standard, petitioner should not have been foreclosed from proving the economic effects of the tying arrangement at a trial. *E.g., Fortner Enterprises, Inc. v. United States Steel Corp., supra*, 394 U.S. at 499-500; *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September, 1974

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 738—September Term, 1973
Argued March 27, 1974 Decided April 17, 1974
Docket No. 73-2448

ANGELO F. CONIGLIO,
Plaintiff-Appellant

v.

HIGHWOOD SERVICES, INC., NATIONAL FOOTBALL LEAGUE,
AND
PETE ROZELLE,
Defendants-Appellees

BEFORE:

KAUFMAN, *Chief Judge*
SMITH and ANDERSON, *Circuit Judges*

Appeal from a judgment for defendants entered in the United States District Court for the Western District of New York, John O. Henderson, *Judge*, upon motions for summary judgment, dismissing plaintiff's complaint charging violations of the Sherman Act predicated on an alleged tying arrangement.

Affirmed.

DAVID BERGER, Philadelphia Pennsylvania (H. Laddie Montague, Jr., Joel C. Meredith, Steven J. Greenfogel, Philadelphia, Pennsylvania; Irving M. Shuman and Gross, Shuman, Wiltse & Laub,

Buffalo, New York, on the brief), for *Plaintiff-Appellant*

FRANK G. RAICHLE, Buffalo, New York (Raichle, Banning, Weiss & Halpern, Buffalo, New York, on the brief; Ralph L. Halpern, David C. Diefendorf, of counsel), for *Defendant-Appellee Highwood Service, Inc.*

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KAUFMAN, *Chief Judge:*

Whatever else might be said about professional football in the United States, it does seem to breed a hardy group of fans who do not fear litigation combat. No fewer than five lawsuits have been instituted by football aficionados from Dallas to New England, each claiming that the respective defendant National Football League (NFL) team had violated the Sherman Act by requiring an individual who wishes to purchase a season ticket for all regular season games to buy, in addition, tickets for one or more exhibition or preseason games. In each case, including the instant one, the response of the district court has been the same: To dismiss the complaint upon the defendant's motion for summary judgment.[1] Without passing

1. *Grossman Development Co. v. Detroit Lions, Inc.*, 1973-2 CCH Trade Cas. ¶74,790 (E.D. Mich. 1973), *appeal docketed*, No. 74-1093 (6th Cir. 1974); *Laing v. Minnesota Vikings Football Club, Inc.*, 1973-2 CCH Trade Cas. ¶74,601 (D. Minn. 1973), *aff'd*, No. 73-1625 (8th Cir. Feb. 11, 1974); *Driskill v. Dallas Cowboys Football Club, Inc.*, 1973-1 CCH Trade Cas. ¶74,544 (N.D. Texas 1973), *appeal docketed*, No. 73-2659 (5th Cir. 1973); *Pfeifer v. New England Patriots Football Club, Inc.*, 1973-1 CCH Trade Cas. ¶74,267 (D. Mass. 1972), *appeal dismissed*, No. 72-1306 (1st Cir. Nov. 1, 1972).

upon the wisdom or desirability of this ticket sale *modus operandi*, we find the practice to be outside the ambit of even the broad reach of the Sherman Act. Accordingly, we affirm.

I

Angelo F. Coniglio is a resident of Amherst, New York, a suburb of Buffalo. An employee of the New York State Power Authority, Coniglio's vocation is hydraulic engineering; his avocation—avid football fan and ardent rooter for the Buffalo Bills football team (Bills).

The Bills, owned and operated by Highwood Service, Inc. (Highwood), was a charter member of the American Football League (AFL), playing its inaugural season in 1960. From its inception, the Bills has been the only professional football team in Buffalo, indeed, filling a void of more than one decade's duration since the demise of the All American Conference in 1949.

Although Coniglio regularly attended the Bills home games from 1960 onward, he did not become a season ticket holder until 1964. With this new status, he gained a number of advantages over those who purchased tickets on an individual game basis, such as, preferential seat selection, preferential call on post-season playoff tickets, and preferential seat selection for the following season. Coniglio repeated his season ticket purchase in 1965.

The year 1966 produced two events of some significance to Bills fans. First, the American Football League and its arch rival, the older National Football League, tentatively agreed to merge into one league, provided Congressional approval, obviating a possible antitrust violation, could be obtained. Second, the Bills altered its season ticket sale policy by requiring the purchaser of a season ticket to also buy a ticket for one exhibition game.

In 1968, the Bills increased the number of exhibition games included in the season ticket package to two. And, two years later, in 1970, the season ticket holders were

required to purchase tickets for three exhibition games. Whether because of this or perhaps because of the congressionally sanctioned[2] merger between the AFL and the NFL,[3] which was also consummated in 1970, the Bills that year saw the end of Coniglio as a season ticket purchaser. The record does reflect, however, that in 1971 Coniglio attended five of the seven regular season home games played by the Bills at Buffalo's War Memorial Stadium, by purchasing individual tickets for each game, and that Coniglio, in fact, had chosen not to attend the two remaining home games that year.

Disenchanted with the Bills's season ticket sale practice, Coniglio commenced an antitrust action against Highwood, the NFL, and its Commissioner, Pete Rozelle, by filing a complaint in the Western District of New York on September 9, 1970. He claimed that for the period, 1966-1970, Highwood's policy of conditioning the purchase of season tickets to a requirement to buy exhibition game tickets, constituted an unlawful tying arrangement in violation of Section 1 of the Sherman Act, 15 U.S.C. §1. Moreover, he charged, it also constituted an abuse of the Bills's monopoly power over professional football in the Buffalo area, in breach of Section 2 of the Sherman Act, 15 U.S.C. §2. In addition, Coniglio alleged that the unlawful tie between season tickets and exhibition game tickets was the product of a conspiracy between Highwood, the NFL, and Rozelle, and that such conspiracy was a further violation of Section 1 of the Sherman Act.

Coniglio initially sought to maintain this suit as a class action,[4] on behalf of approximately 750,000 season ticket

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2. *See* 15 U.S.C. §1291.

3. According to Coniglio's deposition, he was an organizer of the AFL Identity Committee in Buffalo. The Committee's purpose, Coniglio stated, was to urge restoration of the name "American Football League," and use of the AFL's emblem, both of which had been dropped when the merger became effective in 1970.

4. Pursuant to Fed.R.Civ.P. 23(b)(1)(B) and 23(b)(3).

holders of the Bills as well as a number of other NFL clubs, against a defendant class represented by Highwood. In this latter class Coniglio included all NFL clubs with season ticket policies mandating the purchase of exhibition game tickets. Following more than two years of pretrial discovery during which a substantial number of documents were produced by Commissioner Rozelle, the late Judge Henderson, on September 18, 1972, entered an order upon motion of the defendants limiting the plaintiff class to some 23,000 Bills season ticket holders,[5] and denying Coniglio's motion to establish a defendant class.[6]

On March 21, 1973, after additional discovery of documentary evidence and the completion of Coniglio's deposition—the only oral depostion taken by either side—the defendants moved for summary judgment. On August 1, 1973, Judge Henderson, in a brief opinion reported only in 1973 2 CCH Trade Cas. ¶74,795 (W.D.N.Y. 1973), granted the motions and dismissed the complaint.

II

We proceed directly to a consideration of the law applicable to the alleged Sherman Act violations. In *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958), the Court concisely defined a tying arrangement as:

> an agreement by a party to sell one product but only on the condition that the buyer also purchase a different [or tied] product....

Northern Pacific Railway Co. v. United States, supra, 356 U.S. at 5. The Court further elucidated the subject by describing the basis upon which a tying arrangement would be found to be a violation of Section 1 of the Sherman Act.

> [Tying arrangements] are unreasonable [restraints of trade and commerce] in and of themselves when-

5. There are 46,206 seats in War Memorial Stadium.

6. His decision is reported at 60 F.R.D. 359 (W.D.N.Y. 1972).

> ever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected.

Id. at 6. Thus, using *Northern Pacific* as a springboard for our analysis, we can identify four factors essential in determining whether a particular sales practice constitutes an illicit tying arrangement:

(1) two separate and distinct products, a tying product and a tied product;

(2) sufficient economic power in the tying market to coerce purchase of the tied product;

(3) anti-competitive effects in the tied market;

(4) involvement of a "not insubstantial" amount of interstate commerce in the tied market.

It seems clear, at the outset, that the fourth factor is easily satisfied in this instance since, in 1970 alone, the total value of tied exhibition game tickets was approximately $483,000.[7] In *International Salt Co. v. United States*, 332 U.S. 392 (1947), roughly $500,000 of interstate commerce was deemed sufficient. *And see Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969).

We turn next to the second *Northern Pacific* prerequisite—the power to coerce purchase of the tied product—for the district judge rested his decision on the ground that the Bills lacked sufficient economic power in the season ticket (or tying) market to coerce purchase of exhibition game tickets. Judge Henderson concluded that since more

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7. In 1970, there were about 23,000 season ticket holders and each was required to purchase 3 exhibition game tickets at $7 apiece. The total paid by them for these 3 games approximated $483,000.

than half of the 46,206 seats at War Memorial Stadium could be purchased on an individual game basis (as Coniglio himself did in 1971), "there is no tying problem even though the seller may offer a package of both season and preseason [exhibition] game tickets. See *Northern Pacific Ry. v. United States*, 356 U.S. 1, 6 (1958)." *And see Laing v. Minnesota Vikings Football Club, Inc., supra; Driskill v. Dallas Cowboys Football Club, Inc., supra; Pfeiffer v. New England Patriots Football Club, Inc., supra. But see Laing v. Minnesota Vikings Football Club, Inc., supra,* (Lay, J. concurring) (declining to find no coercive power as a matter of law where only 2,500 to 4,000 tickets available on individual game basis). Although the question is indeed a close one, we believe that, despite the relatively large quantity of individual game tickets available here, the district court's conclusion, that as a matter of law the requisite coercive power was absent, is erroneous.

The district judge's reliance on *Northern Pacific* in the factual context of this case seems to have been misplaced. In *Northern Pacific*, the Court noted that "where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." *Northern Pacific Railway Co. v. United States, supra,* 356 U.S. at 6 n. 4. Here, however, the buyer is not "free to take either product [season ticket or exhibition game ticket] by itself." Indeed, it is undisputed that a season ticket could not be purchased unless a certain number of exhibition game tickets, three in 1970, were purchased as well.

Appellee Highwood responds that a season ticket is no more than the sum of its parts—the individual regular season football games played by the Bills in Buffalo—and, therefore, the availability of tickets on an individual game basis eliminates the coercive tie under *Northern Pacific.* We have already referred to the advantages obtained through the purchase of a season ticket, principally the preferential seat selection accorded the season ticket holder.

Although Highwood would thus have us characterize this suit as one to "guarantee every spectator a seat on the 50-yard line for the home games of the Bills,"[8] we are not inclined to take so disparaging a view. Rather, we are mindful of the test for coercive power announced by a unanimous Court in *United States v. Loew's Inc.*, 371 U.S. 38, 45 (1962):

> [T]he crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.

That approximately 23,000 people were "willing" to purchase season tickets in a stadium that can seat only 46,000, is certainly some evidence of the "desirability" of these tickets, sufficient at least to persuade us that the existence of the requisite economic power is a triable issue of fact.

Highwood contends that in any event there is no tying arrangement, lawful or otherwise, because the first prerequisite—the separability of the tying and tied products—has not been satisfied in this case. *See e.g. Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953). It argues that exhibition football games and regular season contents are substantially equivalent, each involving a struggle between two professional football teams fielding eleven-man units with the object of the battle being to get that pigskin across the goal line whether by brain or brawn or both. *See Pfeiffer v. New England Patriots Football Club, Inc., supra*, 1973-1 CCH Trade Cas. ¶74,267 at 93,265. Coniglio answers that exhibition games are clearly inferior to regular season games. He argues cogently that the exhibition season is virtually conceded[9] to

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8. Brief of Appellee Highwood Service, Inc. at 2.

9. Coniglio has included in the record a number of newspaper articles in which professional football coaches rationalize poor performance during the exhibition season on the experimentation theory.

be the time for experimentation with line-ups, plays, etc., during which the won-loss record is of distinctly secondary importance.

Product separability based on quality differentiation has been an essential ingredient in a long line of tying cases. *See e.g. United States v. Loew's, Inc., supra* (block sale of desirable and undesirable movies); *American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272 (2d Cir. 1967) (block sale of television advertising for both desirable and undesirable television stations); *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U.S. 820 (1965) (block sale of desirable and undesirable wire services). To be sure, Highwood urges in response that quality is a continuum on which distinctions could be drawn between each regular season game as well. Although there is a measure of validity in Highwood's position, *see Shayne v. Madison Square Garden Corp.*, 1974 CCH Trade Cas. ¶74,920 at 96,123 (E.D.N.Y. 1973), *appeal dismissed*, slip op. at 1565 (2d Cir. Jan. 22, 1974), we believe that the distinction between exhibition and regular season contests is sufficiently sharp, at the very least, to render the factual determination of product separability more appropriate for a trial rather than for summary judgment. *Grossman Development Co. v. Detroit Lions, Inc., supra*, 1973-2 CCH Trade Cas. ¶74,790 at 95,539.

With Coniglio having successfully traversed three quarters of the field, Highwood raises its final but insurmountable barrier. It contends that Coniglio failed, as a matter of law, to demonstrate an anti-competitive effect in the tied (exhibition football game) market. Quite simply, just as the Bills has a monopoly[10] over the presentation

10. Coniglio does not suggest that this monopoly position was in any way secured in contravention of the Sherman Act, 15 U.S.C. §§1, 2.

of regular season professional football games in the relevant geographic market, which is Buffalo,[11] so too do they have a monopoly over the presentation of exhibition professional football games—the tied product. Thus, Highwood is not using its economic power in the tying (season ticket) market to "restrain free competition in the market for the tied products," *Northern Pacific Railway Co. v. United States, supra*, 356 U.S. at 5, for it is undisputed that, at the time this complaint was filed, there were neither actual nor potential competitors to the Bills in the professional football market.[12] Accordingly, the tying arrangement attacked by Coniglio does not fall within the realm of contracts "in restraint of trade or commerce" proscribed by Section 1 of the Sherman Act, 15 U.S.C. §1. *See Laing v. Minnesota Vikings Football Club, supra; Grossman Development Co. v. Detroit Lions, Inc., supra.*

Coniglio tries strenuously but unsuccessfully to skirt this obstacle. He argues that the tying arrangement foreclosed competition in what could only be characterized at oral argument as the "general entertainment market in Buffalo." Support for this obviously vague assertion, moreover, is limited to a self-serving statement in Coniglio's affidavit in opposition to summary judgment which reads:

> There are alternative activities available on Friday and Saturday evenings [when the Bills's home exhibition football games were generally played] which are attractive to me, including movies, some live theater, and music programs. As a season ticketholder with seats to exhibition games forced upon me at up to

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11. As of 1970 the closest major league professional football team to the Buffalo Bills was the Cleveland Browns, some 189 miles away.

12. We are not unaware of the recent commotion over the nascent World Football League (WFL), which is slated to begin its first season of play this summer. Coniglio does not contend, however, that the WFL was even a glimmer in anyone's eye in 1970.

> $7 per seat, I was precluded from seriously considering alternative activities on game nights.

Not only does this fall far short of Fed.R.Civ.P. 56(e)'s requirement that an affidavit in opposition to a motion for summary judgment "set forth specific facts showing that there is a genuine issue for trial," but we consider the purportedly relevant product market so broadly defined as to render that concept all but meaningless as an analytic tool for assessing the anti-competitive effect requisite to a Sherman Act violation.

We agree with the court in *American Aloe Corp. v. Aloe Creme Laboratories, Inc.*, 420 F.2d 1248 (7th Cir.), *cert. denied*, 398 U.S. 929 (1970) and 400 U.S. 820 (1970), *reh. denied*, 400 U.S. 856 (1970), that "[b]efore there can be a conclusion as to whether there has been . . . a contract in restraint of trade, a determination must be made as to what are the relevant product markets within which to gauge a firm's power or the effect of its activities." In defining the relevant product market, moreover, we are guided by the oft-cited analysis in *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962):

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. (footnote omitted)

And, the Court in *Brown Shoe* added that, in determining product line differential, such considerations as the existence of characteristics peculiar to a particular product and product appeal to a distinct class of customers would prove illuminating. Viewed in this light, Coniglio's claim that plays, movies, and musicals are all within the boundaries of the same product market as exhibition football amounts to nothing more than the boundless contention that, by extracting extra dollars from season ticket holders, the

Bills leave less in their pockets to spend on any other form of diversion, from a trip to the zoo to a night at the opera. Suffice to say that the extraordinary breadth of the market encompassing such diverse yet assertedly competitive products is far beyond that ever contemplated for a *relevant* product market.

Nor can Coniglio bootstrap his hollow claim of an anti-competitive effect into a triable issue by relying on the Supreme Court's admonition in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), that summary judgment may not be appropriate for complex anti-trust litigation "where motive and intent play leading roles, the proof is largely in the hands of alleged conspirators, and hostile witnesses thicken the plot." (Footnote omitted). Unlike *Poller*, in which the key issue was intent to monopolize, the propriety of summary judgment in this case rests on Coniglio's total failure to demonstrate any adverse effect on competition, actual or potential, an issue perfectly well suited to objective, statistical analysis. In such instances, summary judgment is properly granted to lower the curtain on costly litigation where it is clear beyond cavil that one side simply has no support for its version of alleged facts. *See Community of Roquefort v. William Faehndrich, Inc.*, 303 F.2d 494, 498 (2d Cir. 1962).

Coniglio also seeks to avoid the lack of demonstrable, anti-competitive impact of the Bills's ticket sale practice by contending that a deleterious effect on competition is not essential to prove a violation of Section 1 of the Sherman Act. He claims it is sufficient that the tying arrangement merely interfere with the consumer's freedom of choice in deciding whether to purchase the tied product. Although courts have occasionally referred to this as a primary evil of the tying arrangement, *see e.g. Associated Press v. Taft-Ingalls Corp., supra*, 340 F.2d at 762, it represents no more than the causal determinant of the proscribed restraint on competition in the tied market which

ordinarily results from such interference. *Associated Press*, strongly urged by Coniglio, is not to the contrary, for the court was careful to note the existence of United Press International as a competitive wire service. *Associated Press v. Taft-Ingalls Corp.*, *supra*, 340 F.2d at 762, 764. *See also American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres*, *supra* (adverse effect on competition among television networks for advertising). In sum, therefore, neither the cases marshalled by appellant nor the plain language of Section 1, which speaks specifically of contracts "in restraint of trade or commerce," support his contention that Section 1 can be violated absent a showing of such restraint.[13]

Finally, Coniglio turns to Section 2 of the Sherman Act, 15 U.S.C. §2, and argues that, in establishing the tying arrangement, Highwood violated that section by unlawfully abusing its monopoly power in the professional football market. Mr. Justice Douglas's opinion for a majority of the Court in *United States v. Griffith*, 334 U.S. 100 (1948), sets forth the governing rule:

> [T]he use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.

334 U.S. at 107. Accordingly, since we have made plain that Highwood has not used the tying arrangement to either prevent competition or destroy it, its ticket sale practice does not represent an unlawful abuse of its monopoly power. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966); *United States v. Aluminum Co. of America*, 148 F.2d 416, 429-430 (2d Cir. 1945).

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13. Of course, we do not mean to suggest that the consumer lacks standing to raise a Sherman Act claim where he can prove that a foreclosure of competition in violation of Section 1 caused him injury by, for example, artificially elevating prices. *See e.g. Fortner Enterprises, Inc. v. United States Steel Corp.*, *supra*, 394 U.S. at 497.

As for the remaining defendants, the NFL and its Commissioner, Pete Rozelle, it is readily apparent that if Highwood's tying arrangement is not unlawful, an agreement among the defendants to establish that practice, even if it could be proven,[14] would not be unlawul either.

Affirmed.

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14. We note that the record before us does not present a convincing case for conspiracy in any event. The Bills instituted the challenged season ticket package policy in 1966, four years prior to its entry into the NFL, although admittedly only some nine or ten months before Pete Rozelle became, according to his own affidavit in support of the motion for summary judgment, the Commissioner of both the AFL and the NFL in October 1966. Moreover, of the 26 teams in the NFL following the merger, at least 10 did not utilize a season ticket sale policy even remotely similar to that used by the Bills.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of April, one thousand nine hundred and seventy-four.

PRESENT: HON. IRVING R. KAUFMAN
Chief Judge
HON. J. JOSEPH SMITH
HON. ROBERT P. ANDERSON
Circuit Judges

ANGELO F. CONIGLIO, *on behalf of himself and all others similarly situated,*
Appellant

v.

HIGHWOOD SERVICES, INC., *on behalf of itself and all others similarly situated and* THE NATIONAL FOOTBALL LEAGUE, *an unincorporated association, on behalf of itself and its members, and* PETE ROZELLE,
Appellees

73-2448

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. Daniel Fusaro,
Clerk
By Vincent A. Carlin,
Chief Deputy Clerk

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of June, one thousand nine hundred and seventy-four.

PRESENT: HON. IRVING R. KAUFMAN
Chief Judge
HON. J. JOSEPH SMITH
HON. ROBERT P. ANDERSON
Circuit Judges

ANGELO F. CONIGLIO, *on behalf of himself and all others similarly situated,*
Appellant

v.

HIGHWOOD SERVICES, INC., *on behalf of itself and all others similarly situated and* THE NATIONAL FOOTBALL LEAGUE, *an unincorporated association, on behalf of itself and its members, and* PETE ROZELLE,
Appellees

73-2448

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is Ordered that said petition be and hereby is DENIED.

A. Daniel Fusaro
Clerk

IN THE
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 21st day of June, one thousand nine hundred and seventy-four.

ANGELO F. CONIGLIO, *on behalf of himself and all others similarly situated,*
Appellant

v.

HIGHWOOD SERVICES, INC., *on behalf of itself and all others similarly situated and* THE NATIONAL FOOTBALL LEAGUE, *an unincorporated association, on behalf of itself and its members, and* PETE ROZELLE,
Appellees

73-2448

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN
Chief Judge

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ANGELO F. CONIGLIO, *on behalf of himself and all others similarly situated,*
Plaintiff

v.

HIGHWOOD SERVICES, INC.,
THE NATIONAL FOOTBALL LEAGUE,
and
PETE ROZELLE,
Defendants

Civil No. 1970-408

DECISION, ORDER AND JUDGMENT

Upon consideration of the defendants' motions for summary judgment, memoranda of law filed in support and in opposition thereto, affidavits submitted by the parties and the arguments advanced by counsel at the hearing on the motions, for all the reasons set forth in *Pfeiffer v. New England Patriots Football Club, Inc.*, 1973 CCH Trade Cases ¶74,267 (D. Mass. 1972); *Driskill v. Dallas Cowboys Football Club, Inc.*, 1973 CCH Trade Cases ¶74,544 (N.D. Texas 1973); *Laing v. Minnesota Vikings Football Club, Inc.*, 1973 CCH Trade Cases ¶74,601 (D.

Minn. 1973), the motions are granted and it is ordered that summary judgment be, and the same hereby is, granted for the defendants dismissing the complaint and each count thereof.

It is undisputed that at all times mentioned in the complaint tickets for home games of the Buffalo Bills were available for purchase by persons other than season ticket holders and accordingly, the season ticket practices of the Buffalo Bills do not constitute illegal "tying". *Pfeiffer v. New England Patriots Football Club, Inc.*, 1973 CCH Trade Cases ¶74,267 (D. Mass. 1972); *Driskill v. Dallas Cowboys Football Club, Inc.*, 1973 CCH Trade Cases ¶74,544 (N.D. Texas 1973); *Laing v. Minnesota Vikings Football Club, Inc.*, 1973 CCH Trade Cases ¶74,601 (D. Minn. 1973). Because the buyer is free to buy either a season ticket or individual game tickets, there is no tying problem even though the seller may offer a package of both season and preseason game tickets. See, *Northern Pacific Ry. v. United States*, 356 U.S. 1, 6 (1958).

Dated: July 30, 1973

/s/ John O. Henderson
U. S. D. J.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-305

ANGELO F. CONIGLIO,
Plaintiff-Petitioner,

vs.

HIGHWOOD SERVICES, INC., NATIONAL FOOTBALL LEAGUE and PETE ROZELLE,
Defendants-Respondents.

BRIEF FOR DEFENDANT-RESPONDENT HIGHWOOD SERVICES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This Court on October 15, 1974 denied the petition for a writ of certiorari in *Laing v. Minnesota Vikings Football Club, Inc.*, No. 73-1716, ___ U.S. ___ (1974) where the United States Court of Appeals for the Eighth Circuit affirmed the grant of summary judgment dismissing the complaint in a similar class action involving the season ticket policies of the Minnesota Vikings. No reason has been, nor can it be, advanced why the case at bar is to be treated differently than the *Minnesota Vikings* case.

Indeed, in the *Vikings* case only 2,500 tickets out of 47,000 were available on a game-by-game basis, whereas in the case at bar 23,000 tickets out of 46,000 were available on a game-by-game basis.

The Second,[1] Fifth,[2] Sixth[3] and Eighth[4] Circuits have all affirmed summary judgments dismissing the complaint in similar season ticket cases. In addition, an appeal from the granting of summary judgment in the First Circuit[5] was dismissed. All the Courts that have had occasion to concern themselves with the issues raised in season and subscription ticket packages have reached the same result. No conflict exists between Circuits or, indeed, as a result of any District Court decision.[6]

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[1] *Coniglio v. Highwood Services, Inc.*, 495 F. 2d 1286 (2d Cir. 1974). (The case at bar.)

[2] *Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F. 2d 321 (5th Cir. 1974).

[3] *Grossman Development Co. v. Detroit Lions, Inc.*, No. 74-1093, 1974 CCH TRADE CASES ¶ ___, ___F. 2d___ (6th Cir. Sept. 5, 1974).

[4] *Laing v. Minnesota Vikings Football Club, Inc.*, 492 F. 2d 1381 (8th Cir. 1974) *cert. denied*, ___U.S.___(Oct. 15, 1974).

[5] *Pfeiffer v. New England Patriots Football Club, Inc.*, No. 72-1306 (1st Cir. Nov. 1, 1972).

[6] The denial of summary judgment in *Flood v. San Francisco Forty-Niners*, No. C72-1701 (ND Cal. July 9, 1974) is not to the contrary. There the court found that there was a question of fact whether the Oakland Raiders provided competition for the San Francisco Forty-Niners in the Bay area for football fans. In the case at bar the nearest competition is some 189 miles away. (Petitioner's App. 10a, fn. 11)

Question Presented

Did the Court of Appeals err in affirming the judgment granting respondents' motions for summary judgment which held that the season ticket practices of the Buffalo Bills Football Club, hereinafter referred to as the "Bills" (owned and operated by the respondent Highwood Services, Inc.[7]) did not constitute an illegal tying arrangement where the ticket practices of the Bills had no anti-competitive effect and where half the tickets for the home games of the Bills were available for purchase by persons other than season ticket holders, thus properly concluding in effect than the anti-trust laws were not enacted to guarantee every spectator a seat on the 50-yard line for the home games of the Bills.

Statement of Case

Coniglio, the petitioner, is a hydraulic engineer employed by the New York State Power Authority (Petitioner's App. 3a) and a football fan who complains of the Bills' ticket practices. The essence of his complaint seems to be that the Bills offered a season ticket package which consisted of tickets to three preseason games and seven regular season games. *No one was forced to buy the package since tickets were also available on a game-by-game basis.* War Memorial Stadium, where the Bills played their home games during the years involved in this action, had a seating capacity of 46,202 (Petitioner's App. 5a, fn. 5) and the most season tickets sold amounted to 23,000 (11a App. Ct. App.).[8] Accordingly, approximately one-half of the seats in the stadium were available at all times to those who desired

[7] Incorrectly referred to in the title as Highwood Services, Inc.

[8] Appendix in Court of Appeals.

to purchase tickets on a game-by-game basis, excluding or including preseason games according to the purchaser's desire. No one was forced to purchase a ticket for a preseason game as a condition to the purchase of a ticket for a regular season game. The team playing professional football located closest to the Buffalo Bills was the Cleveland Browns, some 189 miles away. Based upon these undisputed facts, the District Court held, *inter alia*, (Petitioner's App. 2d) :[9]

> "It is undisputed that at all times mentioned in the complaint tickets for home games of the Buffalo Bills were available for purchase by persons other than season ticket holders and accordingly, the season ticket practices of the Buffalo Bills do not constitute illegal 'tying.' *Pfeiffer v. New England Patriots Football Club, Inc.*, 1973 CCH Trade Cases ¶ 74,267 (D.Mass. 1972); *Driskill v. Dallas Cowboys Football Club, Inc.*, 1973 CCH Trade Cases ¶ 74,544 (N.D. Texas 1973); *Laing v. Minnesota Vikings Football Club, Inc.*, 1973 CCH Trade Cases ¶ 74,601 (D.Minn. 1973). Because the buyer is free to buy either a season ticket or individual game tickets, there is no tying problem even though the seller may offer a package of both season and preseason game tickets. See, *Northern Pacific Ry. v. United States*, 356 U.S. 1, 6 (1958)."

The judgment of the District Court entered upon its decision was affirmed by the Court of Appeals for the Second Circuit, 495 F. 2d 1286, and the petitioner's motions for rehearing and rehearing *in banc* were both denied.

As summarized by Judge Thornberry in *Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F. 2d 321, 322 (5th Cir. 1974), summary judgments have been granted or upheld on appeal on three different theories: (1) that the tying of preseason to regular season tickets has no anti-competitive effect in the tied market; (2) that fans are not in

[9] 1973 CCH TRADE CASES ¶ 74,795 (WDNY 1973).

fact coerced into buying tickets to preseason games (as part of a season ticket package) in order to gain admission to regular season games when tickets are available on a game-by-game basis; and (3) that no tying of one product to another is possible, since there do not exist two different products—preseason and regular season games—but rather only one indivisible product—professional football games. Although the Second Circuit in the case at bar bottomed its decision only upon the first theory, we believe that all three theories bar the petitioner's claim.[10]

REASONS FOR DENYING THE PETITION

There is no conflict among Circuits for the Court to resolve in this case. On the contrary, the Courts of Appeals for four Circuits have considered the issues raised in these season ticket sale cases, and each Circuit has affirmed a grant of summary judgment for defendants. There is no inconsistency among the decisions of the Courts of Appeals, nor is there any suggestion of a possible source of conflict in any of the decisions. Further, the decision of the Second Circuit in the instant case is fully supported by principles previously established by this Court concerning the terms of the Sherman Act and the elements of private antitrust causes of action.

There is no basic or important question of federal antitrust law presented in this case that should be settled by this Court. The federal courts that have reviewed the

[10] Petitioner's then counsel conceded at the oral argument before the District Court that he could not distinguish the *New England*, *Minnesota* or *Dallas* cases that had at that time been decided either on the facts or on the law. Summary judgment dismissing the complaint had been granted in each of those cases by the District Court at that time.

issues presented, both at the trial and appellate levels, have had no difficulty in determining the established principles to be applied in these season ticket sale cases.

In addition, petitioner's contentions regarding the relevant market were reviewed below on the independent ground that he had completely failed to satisfy the requirements of Fed.R.Civ.P. 56(e) in not raising any genuine issue of material fact requiring a trial. Thus, review of the Second Circuit's holding is not warranted.

As noted, on October 15, 1974, this Court, in *Laing v. Minnesota Vikings Football Club, Inc.*, No. 73-1716, denied a petition for a writ of certiorari to review a decision of the Court of Appeals for the Eighth Circuit that is essentially indistinguishable from the decision of the Second Circuit sought to be reviewed here. The present petition should also be denied.

A. Failure to show restraint on competition.

Petitioner argues that this Court should overrule its prior decisions and announce a new rule that would hold that there is no need to show a restraint on competition to state an antitrust cause of action. The same invitation was extended to this Court in *Laing v. Minnesota Vikings Football Club, Inc.*, No. 73-1716, but the invitation was declined when this Court denied certiorari on October 15, 1974. The petitioner advances no argument why the petition should be granted that was not advanced in the *Minnesota Vikings* petition.

Chief Judge Kaufman, writing for the Second Circuit in the case at bar, analyzed in some detail (Petitioner's App. 9a-13a) the reasons why petitioner failed, as a matter of law, to demonstrate an anti-competitive effect by the

sale of season tickets by the Bills. Petitioner has failed to show any fallacy in Judge Kaufman's reasoning and the result reached therefrom.

In *Champion Oil Service Co. v. Sinclair Refining Co.*, 1974 CCH TRADE CASES ¶ 75,217, ____ F. 2d ____ (6th Cir. 1974) the Court held that in order to constitute a violation of the Sherman Act there must be an anti-competitive effect from the complained of activity. The Court relied upon *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940), where this Court held that the Sherman Act does not apply unless there is some form of restraint upon commercial competition in the marketing of goods or services. The purpose of the Act was stated by this Court in that case to be:

> "The end sought [by the Sherman Act] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . ."

Where there is no evidence that a decision to terminate a relationship or for that matter to sell a season ticket package is made for anti-competitive reasons, the complaining party has failed to prove a violation of the Sherman Act. *Cartrade Inc. v. Ford Dealers Advertising Assn.*, 446 F. 2d 289 (9th Cir. 1971), *cert. denied*, 405 U.S. 997 (1972); *Champion Oil Service Co. v. Sinclair Refining Co.*, 1974 CCH TRADE CASES ¶ 75,217, ___ F. 2d ____ (6th Cir. 1974).

Judge Kaufman disposed of Coniglio's attempt to bootstrap his hollow claim of an anti-competitive effect into a triable issue in his decision (Petitioner's App. 12a-13a): "[T]he propriety of summary judgment in this case rests on Coniglio's total failure to demonstrate any adverse effect on competition, actual or potential, an issue perfectly well

suited to objective, statistical analysis. In such instances, summary judgment is properly granted to lower the curtain on costly litigation where it is clear beyond cavil that one side simply has no support for its version of alleged facts. See *Community of Roquefort v. William Faehndrich, Inc.*, 303 F. 2d 494, 498 (2d Cir. 1962)."

The Court then rejected Coniglio's attempt to avoid the lack of a demonstrable anti-competitive impact of the Bills' ticket sales practice by contending that a deleterious effect on competition is not essential to prove a violation of the Sherman Act. The Court then held that neither the cases marshalled by the petitioner nor the plain language of the Act, which speaks specifically of contracts "in restraint or trade or commerce," support the contention that the Act can be violated absent of showing of such restraint. Finally, the Court concluded that the Bills have not used the ticket sales practice to either prevent competition or destroy it and that such practice does not represent an unlawful abuse of its lawful monopoly power.

In the case at bar, Coniglio simply ignores the fact that the antitrust laws are designed to prevent unreasonable restraints on competition. As Justice Black stated in *Northern Pacific Ry. v. United States*, 356 U.S. 1, 4 (1958):

> ". . . the policy unequivocally laid down by the [Sherman] Act is *competition*." (Italics ours)

In *Northern Pacific Ry. v. United States*, 356 U.S. 1, 6 (1958) this Court was concerned with a tying arrangement in which the railroad sold or leased certain land *on the condition* that the grantee or lessee ship over its lines all goods produced or manufactured on the land. Justice Black grounded his opinion on the effect that tying arrangement had on competition. This Court was careful

to use the *per se* label only in conjunction with an analysis of competition and markets stating at 356 U.S. 6:

> "[Tying arrangements] deny competitors free access to the *market* for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in *another market*. At the same time buyers are forced to forego their free choice between *competing* products." (Italics ours)

In *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 498-499 (1969), the proscribed anti-competitive effect was that a division of United States Steel extended credit only on the condition that a buyer also purchase a certain number of prefabricated houses, thereby restraining competition in the housing ("tied" product) market.

As was noted by Judge Dooling in *Shayne v. Madison Square Garden Corp.*, 1974 CCH TRADE CASES ¶ 74,920 (E.D.N.Y. 1973) *appeal dismissed*, 491 F. 2d 397 (2d Cir. 1974), the one factor common to all of those cases which have found illegal tie-in sales:

> ". . . is the visualization of competing suppliers of the tied product or something that adequately substitutes for it . . . But the visualization is inevitably a clear one: there must be an identifiable something which is interchangeable with the tied product and to which the coerced buyer is denied free access and the supplier of which is denied uninhibited access to the coerced buyer."

In the case of the Bills, there is no interchangeable product which the buyer Coniglio has been prevented from obtaining and there is no supplier of a *substitutional* product who has been deprived of the opportunity to sell such product to the buyer Coniglio.

B. No coercion existed because an abundance of single game tickets were available.

Since 1966, the Bills have offered to the public season tickets consisting of both preseason and regular season games. A "season ticket" consists of separate tickets to each of the home games to be played by the Bills. The Bills make it possible for such tickets to be obtained by a single purchase prior to the playing of the first game. The purchaser of a "season ticket" pays the same price per ticket to each of the games as does a person who purchases tickets on a game-by-game basis and he witnesses the same events.

In the years involved in this litigation the Bills annually sold between 21,265 and 24,700 season tickets in the stadium seating 46,206. Thus, about one-half of the tickets to the Bills' home games were available for purchase by persons other than season ticket holders.

Furthermore, during the same period a purchaser so desiring could buy tickets to one or more games in any combination he desired, including a combination of regular and preseason games or a combination of regular season games alone. In fact, a substantial number of persons bought at one time tickets to nine or less games consisting of combinations of preseason and regular season games, or only regular season games (82a-83a App. Ct. App.).

The record in this case reveals beyond any question that no purchaser was at any time required to purchase a ticket to a preseason game in order to obtain a ticket to a regular season game. These are the *undisputed* and *uncontested* facts of this case and belie any claim that the Bills engaged in a practice of tie-in sales. The availability of tickets to all games precludes any claim of tie-in sales, let alone a claim of an illegal tie.

Coniglio's case, as a minimum, rests on the proposition that the Bills have violated the antitrust laws by requiring persons to purchase tickets to preseason games in order to acquire tickets to regular season games. If, as here, there was no such requirement, then the complaint was properly dismissed.

A tying arrangement is an agreement by a seller to sell one product ("tying" product) to a buyer only on the condition that the buyer also purchase a distinct and different product ("tied" product), and under certain circumstances such an arrangement is illegal under the antitrust laws. *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958); *Fortner Enterprises Inc. v. United States Steel Corp.*, 394 U.S. 495, 497 (1969).

In *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5-6 (1958), this Court enunciated the oft-cited definition of an illegal tying arrangement:

> "For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but *only on the condition that* the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.[4] Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed.
>
> "[4] Of course, where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." (Italics ours.)

Our case exactly! The Bills offered the package but the buyer was free to buy any items as he desired. Even Coniglio did so.

In his petition Coniglio sets forth an excerpt from *Northern Pacific, supra*, but studiously omits this Court's footnote 4, *supra*, which constituted an integral part of this

Court's definition of an illegal tying arrangement. The reason for the omission is clear—the availability of tickets to all regular season games means that a Bills fan is free to purchase a season ticket or tickets to only those games he desires to attend, including all of the regular season games. In other words, the buyer is free to take either product by itself and in whatever numbers or on whatever occasion desired.

The essence of an illegal tying arrangement—the sale of one product *only on the condition* that the buyer purchases another distinct product—is wholly absent under the uncontested facts with respect to the Bills' ticket policies.

That the Bills offer tickets to all of the Bills' home games as a package does not violate of the Sherman Act since the Bills also offer tickets to all of their home games on an individual game basis.

This Court has expressly upheld the right of a seller to sell products in a package. In *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 159 (1948), the Court sanctioned the sale of films in blocks as long as the purchaser had the alternative of buying the films on an individual film basis, stating:

> "We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film."

That language was reaffirmed by this Court in *United States v. Loew's Inc.*, 371 U.S. 38, 55 (1962).

To hold that the Bills' practice of offering tickets in a package constitutes an illegal tying arrangement when tens of thousands of tickets (one-half of them) to all of the Bills' home games have been available prior to the start of

the regular season would mean that manufacturers and retailers could not sell tools by the package, stereo components by the set, razors and blades by the package, or golf clubs by the set, since the retailing of two or more products jointly in and of itself would represent an antitrust violation. Such a result is neither justified by purpose of the antitrust laws to prevent restraints of trade nor warranted by a particular fan's concept of an "ideal" season ticket.

Since an abundance of single game tickets were available for every home game of the Bills, a fact not disputed, the fact that tickets were also offered in a package does not constitute an illegal tie. Accordingly, without more, this point is dispositive of the petition.

C. Tickets to preseason or regular season games are the same product.

The Bills have not, and cannot, restrain competition in another product market since it is involved in only one product market: the market for tickets to the Bills' professional football games. The District Court properly concluded, therefore, that with only one product market, the Bills' ticket policies had no anti-competitive effects.

To further sub-divide the product market on the basis of seat location, or into tickets to preseason games and regular season games, would generate a host of insurmountable problems for the Bills and for the courts. As the court in *Pfeiffer v. New England Patriots Football Club, Inc.*, 1973 CCH TRADE CASES ¶ 74,267 (D. Mass. 1972) pointed out:

> "[W]hile recognizing the obvious differences between exhibition and regular season competition, *the product in both cases is professional football*, and any subdivi-

> sion of the market or product would rest on such gossamer and subjective consideration as to be untenable." (Italics ours.)

In a footnote, the District Court in the *Patriots* case indicated the type of problem courts would encounter if the result was otherwise. The footnote reads as follows:

> "For example, how could a court determine objectively whether a regular season game with the Philadelphia Eagles is a more interesting and desirable product than a preseason game against the Dallas Cowboys?"

Another example in a different field of sports is provided by *Shayne v. Madison Square Garden Corp.*, 1974 CCH TRADE CASES ¶ 74,920 (EDNY 1973) *appeal dismissed*, 491 F.2d 397 (2d Cir. 1974) in which the plaintiff alleged that the Garden's six different season ticket plans violated the antitrust laws. The District Court commented upon the inclusion of preseason New York Rangers (hockey) and New York Knicks (basketball) games in the more comprehensive of the Garden's season ticket plans:

> "It must be noted, however, that denominating regular season games as dominants over 'tied' preseason games implicitly recognizes a principle of differentiation of individual game attractiveness that applies as well among regular season games, the attractiveness of any one of which must often be a function of time, league standings, and possession of 'star' performers.
>
> * * *
>
> "The inclusion in the season subscription plans (particularly Plans 4 and 5) of the preseason games hardly seems significant in a 'tied' and 'tying' analysis. If season subscriptions are not themselves to be impugned, to add or to leave out the preseason games hardly seems of any legal moment."

If this petitioner in this class action were to succeed in getting this Court to tailor a season ticket or tickets to suit

his particular preferences and the differing preferences of the various members of the class, this busy Court and other courts may be faced with countless other suits. For example, the next plaintiff or some members of his class may demand that the Bills' regular season game with the Baltimore Colts be excluded from the season tickets because he or they believe that currently the Colts are a poor team or that the game is scheduled for an inconvenient date. Another plaintiff in the League division which includes the Houston Oilers may insist that a regular season game with that team be dropped because of its record of one victory and thirteen defeats. Another plaintiff or another member of the class which he may claim to represent may insist that all regular season games which follow the game in which the Bills, or any team as to which he is a fan, clinches a play-off spot be excluded on the grounds that the results of the games played thereafter will not affect the final standing of his team.[11]

Some plaintiff may claim that regular season Monday night games be excluded and only Sunday afternoon games be included. Perhaps another plaintiff, sharing Coniglio's antipathy toward the National Conference teams, will ask that games with the teams of such Conference be omitted and only games with other teams in the American Conference of the National Football League be included (the Bills, who are in the American Conference, play regular season games and preseason games with teams of both Conferences). Obviously, the product market, which is *professional football*, cannot be subdivided on the basis of particular football games without creating a panoply of problems ill-suited for resolution by the courts.

[11] One of the plaintiff's claimed differences between a preseason game and a regular season game is that a preseason game doesn't affect the standing of the team.

Expanding upon the Courts' illustrations in the *New England Patriots* and *Madison Square Garden* cases, *supra*, who is to say that a preseason game between the New York Jets and the Bills with Joe Namath passing and O. J. Simpson running is less exciting or poorer entertainment than a regular season game between the Houston Oilers and the New Orleans Saints. Likewise, who is to say that a seat at a preseason game between the star-studded Miami Dolphins and the Minnesota Vikings (a replay of the last Super Bowl encounter) is less desirable than a seat at a regular season game between the Baltimore Colts and the New Orleans Saints. Courts do not sit to decide such questions.

Similar problems, even more complex, loom if the product market is attempted to be subdivided on the basis of seat location. For example, if the market is to be subdivided by seat location, which yard line will form the boundary between the subdivided markets—the 40-yard, the 20, or the goal line? Will a 50-yard line seat in the upper recesses of the stadium be included in the same product market as a seat on the 10-yard line at ground level? Some fans prefer the 10-yard line over the 50-yard line[12] on the theory that the play gets harder and more exciting as a team approaches the other team's goal line. In deciding which side of the field to sit on, some fans object to the sun in their eyes, while others like its warmth. Many fans like low level seats where they can observe sideline activities and cheer their heroes or boo the visitors. Still others prefer high level seats where they can see the deployment of the offense and defense and observe the passing game to better advantage. There are some sophisticates who choose end zone

[12] Just as some baseball fans prefer the first base line to the third base line and others prefer to sit behind the catcher.

seats where with binoculars they can more clearly see the different players in their attempts to carry out their various assignments.

Tying arrangements have been condemned by the courts only when the practice affects competition and only when a seller is able to exert his leverage and power in one product market to restrain *competition* in *another* product market. If a court finds that the controversy is over a single product market, then tying is not possible. We submit the single product market here involved is that of tickets to Bills' home games.

This Court formulated the single products doctrine in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 614 (1953):

> "The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second *distinct* commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to *competition* in the 'tied market'." (Italics ours.)

See also, *Kugler v. Aamco Automotive Transmissions, Inc.*, 337 F. Supp. 872, 874 (D.Minn. 1971), *aff'd* 460 F. 2d 1214 (8th Cir. 1972).

Conclusion

In view of the lack of any anti-competitive effect of the Bills' ticket sales policy, the availability of an abundance of tickets to all Bills' home games and the one product market, it is submitted that the petitioner has failed to state a claim upon which relief can be granted or raise a question of fact upon which the legal issues turn. More importantly, the petitioner has set forth an insufficient basis for the granting of a writ of certiorari and, accordingly, his petition should be denied.

Dated: Buffalo, New York,
October 17, 1974.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

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October Term, 1974

No. 74-305

ANGELO F. CONIGLIO, *Petitioner*

v.

HIGHWOOD SERVICES, INC., *et al.*, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Apart from a short discussion of the questions presented by the Petition (Br. in Opp. 6-9), the Brief in Opposition[1] is devoted to two collateral arguments: (1) that further review is foreclosed because three other courts of appeals "have reached the same result" as that below, with a denial of certiorari in one case (Br. in Opp. 1-2), and (2) that the judgment should stand for reasons that the court of appeals expressly rejected (Br. in Opp. 10-17).

[1] Respondents National Football League and Pete Rozelle have filed no brief in opposition, apparently relying upon the brief of Respondent Highwood Services, Inc.

No reply is needed with respect to the single point on which the court of appeals justified summary judgment. The Petition amply shows the need for this Court's plenary consideration of the proposition that the antitrust laws prohibit only a subspecies of "restraint of trade or commerce" involving restraint of competition and thus do not touch direct restraints upon the consumer's own participation in "trade or commerce."[2] It is only Respondents' collateral arguments – their invocation of the decisions of other courts relating to football tickets and their reliance upon arguments rejected below – that require brief reply.

1. The Brief in Opposition correctly states that three other courts of appeals and a number of district courts have upheld summary judgments for defendants in football ticket tying cases. It further correctly states that they have done so on three different theories: the "no

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[2]We note only the error of Respondents' reliance upon several cases that the court of appeals did not cite in support of its affirmance. Neither *Champion Oil Serv. Co. v. Sinclair Ref. Co.*, 1974-2 Trade Cases ¶75,217 (6 Cir. 1974), nor *Cartrade, Inc. v. Ford Dealers Adv. Assn.*, 446 F.2d 289 (9 Cir. 1971), involved either an alleged tying arrangement or even an alleged *per se* violation; they held only that there is no violation of the rule of reason without proof that the challanged arrangement was "designed to, or did in fact, suppress interbrand competition, or otherwise result in unreasonable restraint of trade" (1974-2 Trade Cases at p. 97,485). That unexceptionable principle bears no relationship to Respondents' proposition that only an injury to "competition" can be a "restraint of trade."

Shayne v. Madison Square Garden Corp., 1974 Trade Cases ¶74,920 (EDNY 1973), held only that a class action was improper with respect to a complex variety of ticket-sale plans, and the *obiter* discussion there of the law of tying arrangements was substantially discounted by the court of appeals below (Pet. App. 9a). There is no question here of the propriety of the district court's class determination in this case (see 60 F.R.D. 359 (1972) and Pet. 4 n.2).

anti-competitive effect" theory articulated below, the "same product" theory,[3] and the "no coercion" theory.[4] What Respondents fail to point out is the inconsistency of the various lower courts in selecting among the various possible theories and the general paucity of analysis supporting their decisions. Thus, for example, the district court opinion in *Laing v. Minnesota Vikings Football Club, Inc.*, 1973-2 Trade Cases ¶74,601 (D. Minn. 1973), granted summary judgment on a "no coercion" theory; its brief opinion cited no authority other than the even briefer opinions in two prior football ticket cases. The Eighth Circuit affirmed in *Laing* with a majority opinion relying on the district court opinion and stating – without elaboration – the further "ground that there is no anti-competitive effect." 492 F.2d 1381 (8 Cir. 1974). In contrast, the opinion below expressly rejected the "no coercion" theory. *Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F.2d 321 (5 Cir. 1974), essentially adopted the Second Circuit's opinion, and the recent affirmance in *Grossman Development Co. v. Detroit Lions, Inc.*, 6 Cir. No. 74-1093, Sept. 5, 1974, was without published opinion.

With the principal exception of the opinion below, the lower court decisions show not a reasoned consensus

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[3] This theory, which Respondents assert as an alternative justification for the judgment below (Br. in Opp. 13-17), contends that there can be no tying arrangement since regular game tickets and exhibition game tickets are not separate and distinct products. The court of appeals rejected this theory as a basis for summary judgment below (Pet. App. 8a-9a).

[4] This theory, which Respondents assert as still another alternative justification (Br. in Opp. 10-13), contends that season tickets do not qualify as a coercive tying product because tickets to individual games can be bought separately. This theory was also rejected below (Pet. App. 6a-8a).

but, at the most, a common antipathy to the difficult questions raised by the ticket tying cases. Only in this case have those questions been given the analysis they deserve and – as the Petition shows – the results of that analysis expose a question of basic antitrust law that requires this Court's plenary consideration. That question is important not only for football fans – who will properly find it anomalous that the rule established below denies Buffalo fans a protection that San Francisco fans are given[5] – but for the interests of consumers in general. The appropriateness of further review is unaffected by the recent denial of the writ in *Laing* (No. 73-1716, October 15, 1974), where the issue was not presented with clarity either in the Eighth Circuit's decision or in the petition.

2. The need for further review is emphasized by Respondents' evident lack of confidence in the court of appeals' *ratio decedendi*. It is significant that they reassert at length the "no coercion" and "same product" theories notwithstanding the reasoned conclusion below that material issues of fact preclude summary judgment with respect to both coercive effect and product separability (see Pet. 4-5, 6a-9a). We need not discuss these issues in the present context, since Respondents' arguments *against* the holding below should not be accepted by this Court without plenary consideration.

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[5] As noted in the Petition (at 10 n.5), Judge Sweigert denied summary judgment for defendants in *Flood v. San Francisco Forty-Niners*, N.D. Cal. No. C72 1704 (July 9, 1974), agreeing with the Second Circuit's analysis but finding an issue as to anti-competitive effect because of the factual circumstance that the Oakland Raiders play in close geographic proximity to the Forty-Niners.

CONCLUSION

The principal question raised by the Petition is set in stark relief by Respondents' argument that the claim is defeated because "there is no interchangeable product which the buyer Coniglio has been prevented from obtaining***" (Br. in Opp. 9). If it is an unlawful restraint of trade to impede a consumer's choice between two interchangeable products, why is it not equally an unlawful restraint of trade to impede his choice not to purchase at all? If so, the court of appeals has misapprehended a fundamental antitrust principle, and this Court should correct it. [6]

The petition for a writ of certiorari should be granted.

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[6] Respondents have made no substantial response to the Petition's second point – that the court of appeals improperly precluded proof of actual anti-competitive effects in the entertainment market even if injury to competition were required. See Pet. 11-12.